1994

State of Utah v. Perry McDonald : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS DOCKET NO. 940105-CA

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 940105-CA
	:	
PERRY McDONALD	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

- - - - - - - -

APPEAL FROM CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY, THE HONORABLE RODNEY S. PAGE PRESIDING

J. FREDERIC VOROS, JR. (3340)
Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

CARVEL R. HARWARD (1403)
Deputy Davis County Attorney

Counsel for Appellee

SCOTT L WIGGINS
HOLMGREN, ARNOLD
& WIGGINS L.C.
American Plaza II, Suite 404
57 West 200 South
Salt Lake City, Utah 84101

Counsel for Appellant

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 940105-CA
v.	:	
PERRY McDONALD	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

- - - - - - - -

APPEAL FROM CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY, THE HONORABLE RODNEY S. PAGE PRESIDING

J. FREDERIC VOROS, JR. (3340)
Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

CARVEL R. HARWARD (1403)
Deputy Davis County Attorney

Counsel for Appellee

SCOTT L WIGGINS
HOLMGREN, ARNOLD
& WIGGINS L.C.
American Plaza II, Suite 404
57 West 200 South
Salt Lake City, Utah 84101

Counsel for Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

STATE STATUTES

OTHER CITES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 940105-CA
v.	:	
PERRY McDONALD,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

- - - - - -

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals from a conviction of aggravated robbery, a first degree felony, in the Second Judicial District Court, Davis County, the Honorable Rodney S. Page presiding.

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2) (k) (1995).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF REVIEW

1. Did defendant knowingly and voluntarily waive his right to counsel?

This court will review the trial court's factual findings supporting a knowing and voluntary waiver for clear error, the trial court's legal conclusions for correctness. *State v. Tenney,* No. 930778-CA, slip op. at 3 (Utah App. Mar. 14, 1996).

2. Is a defendant who waives his right to counsel entitled to the effective assistance of standby counsel?

This issue presents a purely legal question reviewed for correctness. *State v. Pena,* 869 P.2d 932, 936 (Utah 1994).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

This appeal does not require the interpretation of any statutes, rules, or constitutional provisions.

STATEMENT OF THE CASE

Defendant, under the name Terry Storman, was charged with two others on 21 June 1993 with aggravated robbery in violation of Utah Code Ann. § 76-6-302 and 76-3-203.1 (1992) (R. 14-15). Defendant was bound over after a preliminary hearing at which he was represented by William Albright (R. 1).

Before trial, defendant indicated a desire to represent himself (R. 96). After a colloquy, the court permitted defendant to represent himself and assigned Mr. Albright as standby counsel (R.98-99). The jury found defendant guilty of aggravated robbery (R. 31). Defendant was sentenced to a $10,000 fine and a term of five years to life with no enhancements (R. 37, 42-43). He timely appealed (R. 34).

The Supreme Court poured the case over to this Court (R. 513). By order dated 16 September 1994, this Court remanded pursuant to rule 23B, Utah Rules of Appellate Procedure, "for the limited purpose of entry of findings of fact on appellant's claims that former counsel's

pre-trial actions constituted ineffective assistance of counsel. The district court held a hearing and entered findings of fact (R. 697, 703-08).[1]

STATEMENT OF FACTS[2]

The Crime

On 9 May 1993, at about 20 minutes before midnight, defendant and his companion robbed the Arctic Circle restaurant in Clearfield, Utah (R. 129-36). Three employees were there at the time (R. 129-31). Defendant was armed with a handgun (R. 133). The robbers got less than $300 (R. 140). Defendant thought the 22-year old manager was concealing money and said to his companion, "I ought to cap her now for lying" (R. 135).

Self-Representation Issues

After the jury was impanelled at trial, the defendant requested to talk to the judge, and a discussion was held in chambers (R. 93). Defendant stated:

> I don't feel that I'm being properly counseled or as a lawyer being [sic], you know, as far as discussing the matter, because for a fact, number one, he did not get in touch with me any time during the week to even discuss or go over things. He just, you know, like I come to court now, just to go to trial, then he comes and says this and that, but we did not go over no battle plans or any such thing . . . My lawyer did not go over any kind of battle plans or get me prepared for this. He was going to make me a bargain, which I did not—I didn't want to take it. So he did not come and discuss no common battle plans to me. I am not prepared. I really think he is not prepared to go on in this case right now.

---

[1] Defendant has abandoned the issues that formed the basis of his rule 23B remand.

[2] Except as otherwise noted, record facts are stated "in the light most favorable to the jury's verdict." *State v. Verde,* 770 P.2d 116, 117 (Utah 1989).

(R. 93-94). The court invited Mr. Albright to respond. He explained, "I take a position opposite to that, and that puts me in an awkward situation, because I am here to represent him" (R. 94). At the court's prompting, Mr. Albright summarized his trial preparation, including at least three personal visits with defendant in the jail and at least eight telephone calls with defendant and six with his relatives (R. 94-95). He reviewed with defendant "all the evidence," including the preliminary hearing transcript and police reports (R. 95). Mr. Albright had full access to the prosecutor's file and had discussed the case three or four times with the prosecutor, including hearing the prosecutor's rendition of his trial evidence (R. 95-96).

Defendant complained that "he has been prepared, but he hasn't prepared me" (R. 96). In response to the court's questioning, he indicated that he intended to testify on his own behalf (*id.*). The court replied, "Well, then, you have a right to go over that and there is plenty of time to do that" (*id.*). There followed a colloquy concerning defendant's self-representation:

> MR. McDONALD: Do I have the right to go question, myself, the people that he puts on the stand?
>
> THE COURT: You can act as your own attorney if you want to.
>
> MR. McDONALD: Okay[.]
>
> MR. ALBRIGHT: I would be happy to sit there and advise him throughout the trial, your Honor, if he prefers to represent himself.

THE COURT: Do you prefer to represent yourself?

MR. McDONALD: Yes, sir.

THE COURT: I will allow you to do that and make your questioning. You need to understand, however, that you will be required to abide by the same rules of evidence as any attorney would be. Have you been to court before?

MR. McDONALD: Yes.

THE COURT: How many times have you been in court before? Have you been through a trial?

MR. McDONALD: I have seen a trial before, yes, I have.

THE COURT: Have you personally been involved in one?

MR. McDONALD: Yes.

THE COURT: Have you been there when questions were asked and responses were given?

MR. McDONALD: Yes, your Honor.

THE COURT: You have some knowledge then of the rules of evidence?

MR. McDONALD: Yes, sir.

THE COURT: And you know what's required in that regard?

MR. McDONALD: Yes.

THE COURT: You realize that this is a serious case and that the evidence that would be presented is going to be critical in this matter?

MR. McDONALD: Yes.

THE COURT: Knowing that, is it still your desire to proceed and act as your own attorney?

MR. McDONALD: Yes.

THE COURT: How much education have you had, Mr. McDonald?

MR. McDONALD: I graduated, your Honor.

THE COURT: From what?

MR. McDONALD: From high school.

THE COURT: Have you had any college experience?

MR. McDONALD: No, sir.

THE COURT: Do you read, write and understand the English language?

MR. McDONALD: Yes.

THE COURT: And you appear to be very articulate, is that true?

MR. McDONALD: Yes.

THE COURT: Well, you have a right to act as your own attorney, but I will ask Mr. Albright to be here.

MR. McDONALD: Yes. I would like for him to be there.

THE COURT: Would you like him to make your opening argument for you?

MR. McDONALD: Yes, sir.

THE COURT: All right. You can proceed and I will ask you to—you may ask questions or may ask him to ask them for you, however you feel most comfortable.

MR. McDONALD: Okay.

THE COURT: But he will remain there and be there to assist you at any time.

MR. McDONALD: Okay.

(R. 96-99).

Defendant later decided to make his own opening statement (R. 120). His opening statement began as follows:

> MR. McDONALD: Good morning. My name is Perry McDonald, and I [am] prepare[d] to defend myself on this case, on the aggravated robbery. The evidence that the DA gave here is indeed evidence that a robbery had occurred at an Arctic Circle, but me and Dwayne Johnson did not have nothing to do with this robbery, and I will give you the story as it should be really told and the true story.

(R. 120). Defendant continued with a detailed but unsworn narration of his version of the facts (R. 120-26).

After the presentation of evidence, Mr. Albright asked to be excused from closing arguments to attend a preliminary hearing in another matter, but the court denied his request: "I think we need you here, Mr. Albright. The reason for that, there may come up some things in the course of the closing argument by the prosecution that Mr. McDonald may want some consultation on and I would like you available for that" (R. 462); *cf.* Br. of Aplt. at 18.

In closing argument, defendant correctly identified his potential sentence as "five to life" (R. 480). He also in effect testified that "I did not do this crime, that I—I mean really I did not do this crime that is being put upon me" (*id.*).

SUMMARY OF ARGUMENT

Under the totality of circumstances test, the record demonstrates that defendant knew of the dangers and disadvantages of self-representation when he demanded to represent himself. He was informed of the charges against him and had previous experience in court. In addition, defendant's own performance at trial showed legal sophistication.

Defendant's plain error claim that he was denied his right to effective, conflict-free standby counsel fails because (1) a defendant waiving right to counsel has no right to standby counsel of any sort; and (2) defendant has failed to identify a conflict of interest here.

ARGUMENT

POINT I

DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL

Defendant's primary claim is that he did not knowingly, intelligently, and voluntarily waive his Sixth Amendment right to counsel in the trial court. Br. of Aplt. at 20.

Since defendant expressly declined counsel appointed by the trial court, "he has the burden of showing by a preponderance of the evidence that he did not so waive this

right." *State v. Frampton,* 737 P.2d 183, 187 (Utah 1987) (*citing Moore v. Michigan,* 355 U.S. 155, 161-62 (1957)). *Accord State v. Hamilton,* 732 P.2d 505, 507 (Utah 1986) (per curiam); *United States v. Williamson,* 806 F.2d 216, 220 (10th Cir. 1986).

The Sixth Amendment right to counsel implies a right to represent oneself in a criminal trial. *Faretta v. California,* 422 U.S. 806, 834-36, 95 S. Ct. 2525, 2541 (1975), *State v. Tenney,* No. 930778-CA, slip op. at 3 (Utah App. Mar. 14, 1996). However, "the exercise of the right of self-representation necessarily constitutes a waiver of the right to counsel." *State v. Bakalov,* 849 P.2d 629, 633 (Utah App. 1993) (opinion of Greenwood, J.), *approved on cert. by* 862 P.2d. 1354, 1355 (Utah 1993) (per curiam); *accord Faretta,* 422 U.S. at 835).

Hence, the trial court has a duty "to determine if this waiver is a voluntary one which is knowingly and intelligently made." *State v. Frampton,* 737 P.2d 183, 187 (Utah 1987). Defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta,* 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279 (1942)).

"Ideally, the trial judge should conduct a thorough and comprehensive formal inquiry of the defendant on the record to demonstrate that the defendant is aware of the nature of the charges, the range of allowable punishments and possible defenses, and is

fully informed of the risks of proceeding *pro se." United States v. Willie,* 941 F.2d 1384, 1388 (10th Cir. 1991), *cert. denied,* 502 U.S. 1106 (1992). *Accord Frampton,* 737 P.2d at 187 (colloquy on the record is preferred method);[3] *Tenney,* slip op. at 3.

---

[3] "As a guide," the *Frampton* court quoted from the Bench Book for United States District Court Judges, vol. 1 §§ 1.02-2 to -5 (Federal Judicial Center, 3d ed. 1986), which provides:

> An accused has a constitutional right to represent himself if he chooses to do so. A defendant's waiver of counsel must, however, be knowing and voluntary. This means that you must make clear on the record that the defendant is fully aware of the hazards that he faces and the disadvantages of self-representation.
>
> When a defendant states that he wishes to represent himself, you should therefore ask questions similar to the following:
>
> (a) Have you ever studied law?
>
> (b) Have you ever represented yourself or any other defendant in a criminal action?
>
> (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
>
> (d) You realize, do you not, that if you are found guilty of the crime charged in Count I, the court . . . could sentence you to as much as ___ years in prison and fine you as much as $___? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)
>
> (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?
>
> (f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
>
> (g) Are you familiar with the . . . Rules of Evidence?
>
> (h) You realize, do you not, that the . . . Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?
>
> (i) Are you familiar with the . . . Rules of Criminal Procedure?
>
> (j) You realize, do you not, that those rules govern the way in which a criminal action is tried in . . . court?
>
> (k) You realize, do you not, that if you decide to take the witness stand,

(continued...)

However, "a specific warning on the record of the dangers and disadvantages of self-representation is not an absolute necessity in every case if the record shows that the defendant had this required knowledge from other sources." *Meyer v. Sargent,* 854 F.2d 1110, 1114 (8th Cir. 1988). *Accord Fitzpatrick v. Wainwright,* 800 F.2d 1057, 1066 (11th Cir. 1986) (holding that *Faretta* requirements were met without colloquy addressing defendant's "understanding of the risks of self-representation").

"[A]bsent such a colloquy . . . [the appellate court] will look at any evidence in the record which shows a defendant's actual awareness of the risks of proceeding pro

---

[3](...continued)

you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the Rules of Evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

Frampton, 737 P.2d at 187-88 n.12.

se." *Frampton,* 737 P.2d at 188. "[T]he record must somehow otherwise show that the defendant understood the seriousness of the charges and knew the possible maximum penalty. The record should also show that the defendant was aware of the existence of technical rules and that presenting a defense is not just a matter of telling one's story." *Id.* "The ultimate test is not the trial court's express advice, but rather the defendant's understanding." *Fitzpatrick,* 800 F.2d at 1065.

"In this regard, whether a knowing and intelligent waiver has been made turns upon the particular facts and circumstances surrounding each case." *Frampton,* 737 P.2d at 188. *Accord Willie*, 941 F.2d at 1389; *Meyer v. Sargent,* 854 F.2d 1110, 1114 (8th Cir. 1988). The court may inquire into the "totality of the circumstances, including the background, experience, and conduct of the defendant," *Williamson,* 806 F.2d at 220; various factors have been considered in addition to those mentioned.

Education and family. A defendant's educational level and the presence of family members may be relevant factors. *See Williamson,* 806 F.2d at 220 (considering defendant's education and presence of defendant's parents in upholding waiver of counsel). *See also United States v. Hafen,* 726 F.2d 21, 25 (1st Cir.), *cert. denied,* 466 U.S. 962 (1984).

Prior legal experience. A defendant may have "had previous contact with the criminal justice system sufficient to give him a general knowledge of the dangers and

disadvantages of self-representation." *Meyer,* 854 F.2d at 1114-15 (relying in part on defendant's reference to "legal technicalities that I do not understand"). In *Frampton,* the supreme court noted that "[t]he value of counsel should have been apparent to defendant" based on his prior prosecution for the same offense. 737 P.2d at 189.

Standby counsel. Similarly, "[t]he fact that the trial court insisted upon appointing standby counsel must have imparted to defendant the seriousness of the charges pending against him." *Id.* at 189 n.19.

Pretrial proceedings. Pretrial proceedings, including arraignment, may be relevant to whether a defendant's waiver was knowing and intelligent. *See Willie,* 941 F.2d 1384 (relying in part on arraignment to establish knowing and intelligent waiver of right to counsel).

Representation before trial. "Another factor courts consider in determining whether the risks of a pro se defense are understood is whether a defendant is represented by counsel before trial." *Fitzpatrick* 800 F.2d at 1066 (holding that *Faretta* requirements were met in waiver of counsel).

Conduct at trial. An appellate court may consider whether defendant's "conduct at the trial" tended to show "that he had a good knowledge of the criminal justice system." *Meyer,* 854 F.2d at 1115. *United States v. Hafen,* 726 F.2d 21, 25 (1st Cir.), *cert. denied,* 466 U.S. 962 (1984) (noting that defendant "efforts in his own

behalf" were not "wholly incompetent"). Thus, for example, this Court in *Tenney* rested its conclusion that defendant knowingly, intelligently, and voluntarily waived his right to counsel on defendant's statements "on the fourth day of trial" and the fact that he "conducted himself ably during trial . . ." *Tenney,* slip op. at 4-5.

Here defendant's colloquy was fairly thorough. He was told that he had the right to represent himself; that he would "be required to abide by the same rules of evidence as any attorney would be"; and that his was a serious case in which critical evidence would be presented. The court ascertained that defendant had been personally involved in a previous trial; that he had observed the giving of testimony in the question-and-answer format; that he had a rudimentary knowledge of the rules of evidence; that he was a high school graduate; that he was literate and fluent in English; and that he could have his standby counsel conduct examination or argument for him (R. 96-99).

Looking beyond the formal colloquy, many of the circumstantial factors identified above were present in this case. From the preliminary hearing and arraignment defendant was aware of the charges against him and the penalty he faced (R. 17, 520-623). In fact, in his opening statement, defendant informed the jury, "this is a five to life, okay" (R. 125). Defendant had previous legal experience, having been "personally involved" in a prior trial (R. 40). And of course, defendant was

represented before trial and had standby counsel throughout trial, including during closing arguments (R. 360, 462).

In addition, defendant's trial performance was at times impressive for a layman. Consider the following cross-examination of an eyewitnesses:

O. Okay. Did you give any facial descriptions of the person that took your money?

A. Yes, I did.

Q. Except for other than bony face?

A. No, I don't think so.

Q. Did this person have a beard?

A. I didn't say. I couldn't remember.

Q. Did this person have a mustache?

A. I didn't say.

Q. Did this person have any scars on his face?

A. I couldn't tell.

Q. Did you see the color of this person's eyes?

A. No, I didn't.

Q. Did you see any tattoos or anything?

A. No, I didn't.

Q. Did you see this person have a gun?

A. I didn't. I don't recall seeing one.

Q. But yet you still can see that the person was me?

A. Yes.

MR. McDONALD: Okay. Thank you.

(R. 180).[4]

Defendant was able to examine his codefendant Dwayne Johnson over objection from Johnson's counsel (R. 359-71). Johnson's testimony, if believed, would have exonerated both defendants (*see* R. 365-67). Defendant's stratagem left Johnson's attorney in the position of cross-examining his own client (R. 372).

Defendant's thorough knowledge of police reports and the preliminary hearing transcript are apparent from his use of them in opening statement and witness examinations (*see* R. 123-25, 172-74, 424-25). In fact, he forced at least one witness to admit that a statement in her police report was "a mistake" (R. 174).

Near the conclusion of trial, the trial judge said to defendant, "I think you have done very well representing yourself. You have asked relevant questions and you have done a good job" (R. 462).

---

[4] Defendant seems to have "develop[ed] an instinct for" Cicero's Ninth Commandment: "Avoid one question too many." Irving Younger, *A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination,* LITIGATION, Winter 1977 at 18.

Finally, defendant's waiver was not "a result of coercion or mistreatment of the defendant." *Fitzpatrick* 800 F.2d at 1067. Although at trial defendant complained that his attorney was unprepared, on appeal he does not claim that his election to represent himself was involuntary in the sense that he was forced to choose between self-representation and ineffective appointed counsel. *Cf. United States v. Burson,* 952 F.2d 1196, 1199 (10th Cir. 1991) (rejecting involuntariness claim on the ground that defendant failed to show good cause for dissatisfaction with his appointed counsel), *cert. denied,* 503 U.S. 997 (1992). Indeed, defendant welcomed Mr. Albright to act as his standby counsel, stating, "I would like for him to be there" (R. 98).

In sum, defendant has failed to carry his "burden of showing by a preponderance of the evidence" that he did not knowingly, intelligently, and voluntarily waive his right to counsel. *Frampton,* 737 P.2d at 187. The record in this case shows that defendant "understood the seriousness of the charges and knew the possible maximum penalty." *Id.* at 188. He "was aware of the existence of technical rules and that presenting a defense is not just a matter of telling one's story." *Id.* The "totality of the circumstances, including the background, experience, and conduct of the defendant," *Williamson,* 806 F.2d at 220, confirm that defendant understood "the dangers and disadvantages of self-representation," and that "he [knew] what he [was] doing and his choice [was] made with eyes open." *Faretta,* 422 U.S. at 835.

POINT II

DEFENDANT HAS FAILED TO ESTABLISH EITHER THE RIGHT TO EFFECTIVE STANDBY COUNSEL OR THAT HIS STANDBY COUNSEL LABORED UNDER AN ACTUAL CONFLICT OF INTEREST

Defendant claims that his right to self-representation was violated by the appointment of standby counsel laboring under an actual conflict of interest. Br. of Aplt. at 37.

Defendant asserts without authority that "the Sixth Amendment right to self-representation can be violated, per se, by an actual conflict of interest between standby counsel and the client." Br. of Aplt. at 39. Defendant claims support for this proposition from *Strickland v. Washington,* 466 U.S. 668, 692 (1984). However, *Strickland* neither states nor implies this proposition. *Strickland* addresses only "the Sixth Amendment guarantee of counsel." *Id.* at 691.

The right to self-representation and the right to effective assistance of counsel are converse; "the exercise of the right of self-representation necessarily constitutes a wavier of the right to counsel." *Bakalov,* 849 P.2d at 633 (opinion of Greenwood, J.). *Accord Frampton,* 737 P.2d at 187; *Hance v. Zant,* 696 F.2d 940, 950 (11th Cir.), *cert. denied,* 463 U.S. 1210 (1983), *overruled on other grounds, Brooks v. Kemp,* 762 F.2d 1383 (11th Cir. 1985). This is so even of a pro se defendant who at times defers to standby counsel. *Parker v. Norris,* 859 F.Supp. 1203, 1227-28 (E.D. Ark. 1994),

rev'd on other grounds, 64 F.3d 1178 (8th Cir. 1995), *cert. denied,* ___ U.S. ___, 116 S. Ct. 820 (1996).

Indeed, although appointment of standby counsel is a preferred practice, it is not mandatory. *United States v.Padilla,* 819 F.2d at 952, 959 (10th Cir. 1987). *See also Faretta,* 422 U.S. at 834 n. 46 ("Of course, a State *may* . . . appoint a 'standby counsel' to aid the accused . . .") (emphasis added). Since defendant has no right to standby counsel, he certainly has no right to effective standby counsel.

In short, there exists "no constitutional right to effective assistance of standby counsel." *United States v. Windsor,* 981 F.2d 943, 947 (7th Cir. 1992) ("This court knows" of no such right). Accordingly, defendant's claim is unsupported in law.

Moreover, defendant fails to establish that his standby counsel labored under a conflict of interest. Defendant points only to his own pretrial statement that he did not think Mr. Albright was prepared to go to trial. Br. of Aplt. at 42.[5] This remark, even if true, would not establish a conflict of interest. An actual conflict of interest, and thus a presumption of prejudice, will be found "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland,* 466 U.S. at 692 (citation

---

[5] Defendant later retreated to the position that Mr. Albright "has been prepared, but he hasn't prepared me" (R. 96). In fact, defendant appeared to be well prepared to mount his defense that the crime was committed by someone other than himself. He to put on his defense through his codefendant without the risk of taking the stand himself (*see* R. 369-71).

omitted). Defendant has made no such demonstration here. Consequently, his claim is unsupported in fact as well as law. There was no error here, plain or otherwise.

CONCLUSION

Defendant's conviction and sentence should be affirmed.

ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

The State believes that oral argument may aid the decisional process in this case. It also recommends publishing an opinion to further define the law of waiver of counsel and to make explicit in Utah that a defendant who waives counsel has no right to effective assistance of standby counsel.

RESPECTFULLY submitted on 18 March 1996.

JAN GRAHAM
Attorney General

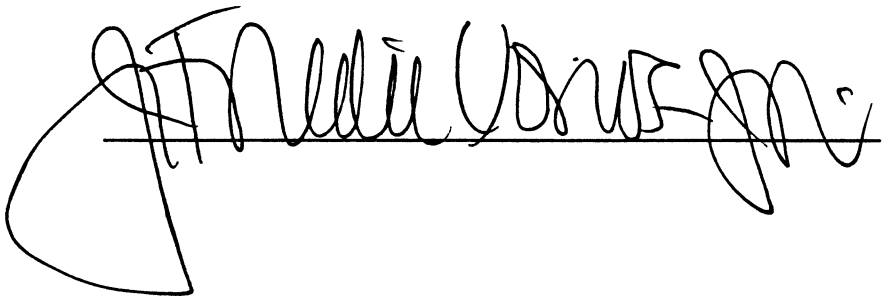
J. FREDERIC VOROS, JR.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were mailed by first-class mail this 18 March 1996 to the following:

SCOTT L WIGGINS
P. O. Box 1468
Beaver, Utah 84713

Counsel for Appellant



ADDENDUM A

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

PERRY McDONALD, and
DWAYNE JOHNSON,

Defendant.

Case No. 931700302 & 300

BEFORE THE HONORABLE RODNEY S. PAGE

August 4, 1993

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial

Volume I

Reported by: MICHELLE K. HARRISON,
CSR, RPR

would like you to congregate in the one furthest to your right so you are away from the general traffic of the courthouse. There are restrooms and water fountains there and that's where we would like you to congregate when we take any recesses and when you return from lunch and those kind of things. So we will take a 10-minute recess at this time.

Those of you who were not selected are free to leave at this time or you are welcome to stay. What's going to happen is when the jury comes back in 10 minutes, I am going to instruct them on some law relative to what their responsibility is. Counsel will then make opening statements and then we will begin taking evidence in this case. So if you want to stay and see how things happen you are welcome to do that, but other than that, you are excused at this time. Thank you for being here. Court will be in recess.

(Whereupon a recess was taken.)

(Whereupon these matters were held in chambers.)

MR. MURPHY: Mr. McDonald has asked to talk to you, Judge

THE COURT: We are in chambers in the matter of State of Utah vs. Perry McDonald. The defendant is present, along with Mr. Albright and Carvel Harward from the Davis County Attorney's Office.

Mr. McDonald?

MR. McDONALD: Yes, your Honor. I don't feel

that I'm being properly counseled or as a lawyer being, you know, as far as discussing the matter, because for a fact, number one, he did not get in touch with me any time during the week to even discuss or go over things. He just, you know, like I come to court now, just to go to trial, then he comes and says this and that, but we did not go over no battle plans or any such thing.

Then, two, the DA brings in coats and jackets that he did not prevail doing in my preliminary hearing, and that I am not getting proper counseling. My lawyer did not go over any kind of battle plans or get me prepared for this. He was going to make me a bargain, which I did not -- I didn't want to take it. So he did not come and discuss no common battle plans to me. I am not prepared. I really think he is not prepared to go on in this case right now.

THE COURT: Mr. Albright.

MR. ALBRIGHT: Your Honor, I take a position opposite to that, and that puts me in an awkward situation, because I am here to represent him.

THE COURT: You need to represent what your efforts have been.

MR. ALBRIGHT: Okay. I have been to the jail at least three times to visit him and discuss the case. I provided him with all the police reports, all preliminary hearing transcripts, and I have reviewed all of that material

with him. I have taken at least eight phone calls collect from him at my own expense, paid for those phone calls. I have had at least a half dozen phone calls from relatives. I have had -- and I have been happy to talk to all his relatives regarding the case, and they have relayed messages to me from him when they felt that it was appropriate. We discussed the plea bargain about three or four days beforehand with a jail visit. He informed me he was going to take the plea. I talked to him before we went into court and I sat down and we reviewed all the evidence one more time and he, at that time, told me he would take the plea. When we went into court he changed his mind, which is his right, and decided at that time that he would go to trial.

I am prepared at this time, because of our previous -- my previous jail visits, previously going over the preliminary hearing transcript and all of the police reports, which also I did do, I did personally do the preliminary hearing, so I have seen the evidence. I met with Mr. Harward numerous times on this. In fact, he has provided me with full access to his file, which he has had an open file. I have been to his office at least three times and reviewed the complete file, and I have had probably three or four conversations, two of which I have sat down and in Mr. Harward's office to review the evidence that he would be presenting. In fact, I think it was two days ago that Mr.

Harward and myself reviewed completely his case in chief, and I also at that time discussed with him what my plan was of the evidence that I would present during the trial and my theory of the case. So we have -- my relationship with the prosecutor's office has been full disclosure and I have been prepared on this matter as of last week.

THE COURT: Mr. McDonald?

MR. McDONALD: Just like he said, he has been prepared, but he hasn't prepared me. I am the one that is going to have to go up and do a five to life.

THE COURT: I don't know what more preparation you would make, Mr. McDonald. Are you going to testify?

MR. McDONALD: Yes, sir.

THE COURT: Well, then, you have a right to go over that and there is plenty of time to do that

MR. McDONALD: Do I have the right to go question, myself, the people that he puts on the stand?

THE COURT: You can act as your own attorney if you want to.

MR. McDONALD: Okay

MR. ALBRIGHT: I would be happy to sit there and advise him throughout the trial, your Honor, if he prefers to represent himself.

THE COURT: Do you prefer to represent yourself?

MR. McDONALD: Yes, sir.

THE COURT: I will allow you to do that and make your questioning. You need to understand, however, that you will be required to abide by the same rules of evidence as any attorney would be. Have you been to court before?

MR. McDONALD: Yes.

THE COURT: How many times have you been in court before? Have you been through a trial?

MR. McDONALD: I have seen a trial before, yes, I have.

THE COURT: Have you personally been involved in one?

MR. McDONALD: Yes.

THE COURT: Have you been there when questions were asked and responses were given?

MR. McDONALD: Yes, your Honor.

THE COURT: You have some knowledge then of the rules of evidence?

MR. McDONALD: Yes, sir.

THE COURT: And you know what's required in that regard?

MR. McDONALD: Yes.

THE COURT: You realize that this is a serious case and that the evidence that would be presented is going to be critical in this matter?

MR. McDONALD: Yes.

THE COURT: Knowing that, is it still your desire to proceed and act as your own attorney?

MR. McDONALD: Yes.

THE COURT: How much education have you had, Mr. McDonald?

MR. McDONALD: I graduated, your Honor.

THE COURT: From what?

MR. McDONALD: From high school.

THE COURT: Have you had any college experience?

MR. McDONALD: No, sir.

THE COURT: Do you read, write and understand the English language?

MR. McDONALD: Yes.

THE COURT: And you appear to be very articulate, is that true?

MR. McDONALD: Yes.

THE COURT: Well, you have a right to act as your own attorney, but I will ask Mr. Albright to be here.

MR. McDONALD: Yes. I would like for him to be there.

THE COURT: Would you like him to make your opening argument for you?

MR. McDONALD: Yes, sir.

THE COURT: All right. You can proceed and I will ask you to -- you may ask questions or may ask him to

ask them for you, however you feel most comfortable.

MR. McDONALD: Okay.

THE COURT: But he will remain there and be there to assist you at any time.

MR. McDONALD: Okay.

THE COURT: Mr. Harward?

MR. HARWARD: Yes, your Honor. I am the prosecutor who approved the filing of this case. I've considered it an important case since I first became aware of it. Three people were charged, the two defendants before the Court today. The third defendant is Cal Johnson. There was a preliminary hearing at the Circuit Court for Cal Johnson, and I know in connection with that hearing, Mr. Albright had a great interest. I shared some information with Mr. Albright in connection with that hearing. The preliminary hearing for the defendant now before the Court was set and continued. Each time I was prepared. Each time I had contact with Mr. Albright, shared with him information.

One of the complaints Mr. McDonald expressed a few moments ago is he now is learning of some evidence for the first time that wasn't presented at the preliminary hearing. At the preliminary hearing in his case, the State had marked and had offered several exhibits. Some are the same exhibits today. But we did introduce all of the exhibits at the preliminary hearing that we have available

today.

During the course of the investigation of this case, the police gathered many items. Mr. Albright has had a list and has explained to him all of the evidence. It has been brought to the courthouse today and I've selected 19 different articles that I am going to use for evidence. One of the concerns Mr. McDonald has is on a list that I had prepared, I have item no. 14, which is identified as a jacket with a Raiders on it, and I have in parentheses, "Dwayne was wearing." That's an inadvertence on my part. Before we came into chambers a few minutes ago, I shared with Mr. Albright and Mr. Murphy my inadvertence. We expect the evidence will show that Mr. McDonald was wearing that. That's consistent with the police reports and the information that Mr. Albright has had prior to today. Mr. McDonald was concerned that now we are switching evidence right at the last moment. That is a typographical inadvertence.

THE COURT: You need to realize, Mr. McDonald, what they say evidence is doesn't necessarily mean what it is or what conclusion they are going to -- the jury is drawing from it. They are going to have to prove beyond a reasonable doubt out there what they say. It makes no difference to me or to the jury. They have got to prove it.

MR. McDONALD: Okay.

MR. HARWARD: There is one other thing I want to say in conclusion. It is true that Mr. Albright, as already reported, has contacted me several times. I am a person who talks a lot, and I have shared my personal observation about the case, the strategy that I intend to follow, and I know that he was prepared, even before the preliminary hearing, to meet the State's evidence, and it was a fairly long preliminary, and I know that he has been diligent in his efforts in becoming aware of the case, which considered legal issues in the case, and otherwise has been very active in working on the matter.

THE COURT: The Court would find that this matter went to preliminary hearing, and that the defendant was represented by Mr. Albright at the preliminary hearing. All evidence has been disclosed through an open door policy at the County Attorney's Office, and there is no evidence which is not known to the defendant through his counsel. The Court would further find that defense counsel has met with the defendant on numerous occasions, has talked with family members and all others who have had information in this matter, and is fully prepared to go to trial today and is acting as adequate counsel, in fact, probably more than adequate under the law.

The Court would find that he is present and I will direct counsel to remain at counsel table with Mr.

McDonald in the event he wishes to consult with him or have him participate in any part of the trial. Mr. McDonald has requested that he make the opening statement, and as the trial goes along, you can elect whether you want to cross-examine or you want Mr. Albright to, Mr. McDonald, but you both can't do it on a particular witness. If he starts out and there are other questions you want him to ask, you are welcome to convey those to him, but I won't let you cross-examine and then Mr. Albright cross-examine. See what I'm saying?

MR. McDONALD: I understand, your Honor.

THE COURT: That's just to cut down stress on witnesses, really, and to keep order in the courtroom.

MR. McDONALD: Okay.

THE COURT: All right. Are you ready to go? All right. Thank you.

MR. ALBRIGHT: Thank you.

MR. HARWARD: Thank you.

MR. McDONALD: Thank you.

(Whereupon a recess was taken.)

(Whereupon these matters were held in chambers.)

THE COURT: We are in chambers in the matter of State of Utah vs. Dwayne Johnson. The State is present and represented by Mr. Harward, and Mr. Johnson is present and represented by Mr. Murphy.